No. 46622-8-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

RUSSELL P. HICKS,

Respondent,

v.

CITY OF FIFE, a Washington municipal corporation,

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES (Continued)

CASES (Continued)

CASES (Continued)

STATUTES

STATUTES (Continued)

COURT RULES

OTHER AUTHORITIES

I. INTRODUCTION

Russell Hicks asks that this Court affirm the trial court's decision to deny Fife's RCW 4.24.525 anti-SLAPP motion. Hicks sued only one party – the City of Fife – and asserted only one cause of action – retaliation in violation of the Washington Law Against Discrimination (WLAD). CP 3. In determining whether retaliation occurred, the jury must consider all evidence in context and determine whether the employer's response is likely to deter a reasonable person from engaging in opposition activity in the future. *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006).

Inconsistent with this well-established principle of law, Fife filed a special motion to strike impermissibly seeking to isolate one piece of evidence outlined in the complaint and incorrectly arguing the anti-SLAPP statute applies to this evidence. What is more, Fife filed the motion claiming it was standing up for the petition activity of an unnamed third party, the Fife Civil Service Commission – an action proscribed by the Washington Supreme Court's decision in *Henne v. City of Yakima*, __ Wn.2d __, 341 P.3d 284, 285 (January 22, 2015).[1]

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[1] Fife's Assignment of Error to this Court reaffirms this point by explaining "the City requested the trial court strike a retaliation claim targeting protected participation and petition activity of the City's Civil Service Commission." Respondent's Br. at 4. (Emphasis added).

Fife's anti-SLAPP motion is built by stacking a series of inaccurate principles. First, Hicks only filed suit against Fife, which has no First Amendment speech rights, nor can Fife be a "moving party" under the text of the anti-SLAPP statute. In *Henne*, the plaintiff sued only Yakima, not the co-workers who made allegedly protected comments, and the Washington Supreme Court held that Yakama could not file an anti-SLAPP motion. 341 P.3d at 286. Fife's brief to this Court was filed on February 9, 2015, yet it does not address *Henne*.

Second, Fife sought to re-characterize Hicks' WLAD retaliation cause of action into three discrete "claims" as opposed to the single cause of action as pled by Hicks. However, as correctly observed by the trial court, Fife's request to deconstruct the evidence into separate claims is inconsistent with Washington law on retaliation cases where all evidence is viewed to analyze the cause of action in the totality of the circumstances.

Third, on the merits, Fife does not actually analyze Hicks' case as pled, but instead claims Hicks should have sued the Fife Civil Service Commission when challenging his lack of promotion. Again, Fife contorts Hicks' lawsuit. Fife is the employer, not the Civil Service Commission. RCW 49.60.040(11). Fife decides who to hire for promotion from the civil service list. CP 379. Fife did not want to

promote Hicks from the list, so the City waited until after the civil service list, with Hicks as the top applicant, expired.

The trial court correctly denied Fife's motion.

II. RESTATEMENT OF ASSIGNMENT OF ERROR

1. Was the trial court correct for denying Fife's anti-SLAPP motion?

2. Was the trial court correct for denying Fife's anti-SLAPP motion when the gravamen of the case before it was for retaliation, not an attack on protected speech?

3. Was the trial court correct for denying Fife's anti-SLAPP motion when Hicks presented compelling direct and circumstantial evidence of retaliation?

4. Was the trial court correct for denying Fife's anti-SLAPP motion because the statute is unconstitutional?

III. STATEMENT OF THE CASE

Russell Hicks is a Fife police officer who joined the department in 2005 after many years of successful service at other law enforcement agencies. CP 370. Hicks is Hispanic. CP 372. On January 14, 2011, Hicks filed a Charge with the Washington State Human Rights Commission alleging discrimination in violation of the WLAD. CP 371-72. His Charge included reporting that he was unlawfully

denied a bilingual pay premium by Chief Brad Blackburn and the City of Fife. *Id.* Fife later agreed Hicks was qualified to receive bilingual pay and retroactively compensated Hicks for five years of bilingual premium back pay. CP 371. Hicks, along with a second officer, also reported the unlawful actions internally. *Id.*

In the spring of 2011, Hicks learned of an opportunity within the department for promotion to the position of Lieutenant. CP 373. Hicks submitted written materials and on May 4, 2011, he took the promotional written test. *Id.* Hicks scored 83 on this exam, and he was ranked first out of the eight passing applicants. *Id.*

On May 18, 2011, Hicks took the second phase of the Lieutenant testing process, which was an oral board with four interviewers. *Id.* Following his oral board, Hicks was notified by the Fife Human Resource Department that he received a low score for the oral board portion of the exam, a 79.75. CP 374. Hicks learned that one of the interviewers, Julie Johnson, was a very close and personal friend of Chief Blackburn. *Id.* This score on the oral board took Hicks from the top position to the middle of the applicant pool. *Id.* Hicks met with Fife's HR Director to discuss his scores for the oral board. *Id.* During this meeting, Hicks learned he received scores of 82, 83, and 84 from the three other examiners, but Johnson gave him an initial score of 67

and then ultimately increased it to a 70. *Id.* Human Resources told Hicks that Johnson had given the highest score of 86 to another officer and the lowest score she gave was 70, which she gave to Hicks. *Id.*

On June 8, 2011, Hicks completed the third and final portion of the Lieutenant testing process. CP 374. Hicks finished first on this portion, which had the effect of taking him to the top of the civil service list for promotion. CP 375.

Due to Johnson's scoring, Hicks issued a report with the Washington State Patrol, wherein he asserted that the downgrade in his oral boards was done in retaliation for his prior reports against Johnson's friend, Chief Blackburn. CP 375. The Washington State Patrol did a "preliminary investigation" and decided on August 8, 2011 that Hicks' report about Johnson "was not accepted." CP 434. The next day, August 9, 2011, Chief Blackburn instigated an investigation into Hicks alleging Hicks was speaking about his opposition to discrimination and retaliation and claimed the conversations by Hicks were acts of misconduct. CP 376. In relevant part, Blackburn[2] wrote through counsel:

> Officer **REDACTED** openly discusses the nature of the . . . ongoing investigation and the most recent allegations of

[2] Although the letter is redacted, Fife identified "the Fife Police Chief" as the client for which this letter was drafted and transmitted. CP 20.

> retaliation he has reported to the City and to the Washington State Attorney General.
>
> . . . .
>
> His conduct is insubordinate and discourteous and needs to be addressed by the City.

CP 437-38. Fife hired an investigator to evaluate Chief Blackburn's complaint about Hicks. At this same time, Hicks was also serving as Acting Lieutenant.[3] CP 376.

After finishing her work, the investigator determined, on October 12, 2011, that the complaint by the Chief of Police against Hicks was "false or not factual."[4] Fife communicated the results of its investigation to Chief Blackburn on October 17, 2011. CP 442. In response, and within a week, Chief Blackburn, through his attorney, wrote a second letter about Hicks. CP 455. In this letter, Blackburn made clear he was angry about Hicks filing internal reports of discrimination, filing with the Human Rights Commission, and that he did not want Hicks as his Lieutenant as a result. The October 25, 2011 letter, with redactions made by Fife, provides, in part, as follows:

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[3] Hicks served in this role for approximately six months on three separate two-month assignments through the summer of 2012. CP 376. Despite Blackburn's hostility, Hicks received a positive mid-year performance review on January 17, 2012, which reflects the same time he was serving in the role of Acting Lieutenant. CP 453.

[4] The investigator determined that the Blackburn complaint about Hicks was "unfounded" which equates to "false or not factual" under the Fife polices. CP 440-442. Interestingly, the City of Fife changed the results when communicating to Hicks, incorrectly stating that the investigator merely "concluded that the allegations were unable to be sustained." CP 443. Unsustained merely means the investigator could not reach a conclusion one way or the other, which was not the case. CP 440.

> Despite the City's award to REDACTED and REDACTED of bilingual pay, despite REDACTED recommendation that the award be retroactive to their initial date of hire, and despite the Washington Human Rights Commission's determination that the complaining parties had not been subject to discrimination, REDACTED and REDACATED nonetheless hired legal counsel for the express purpose of making complaints against the Department's Command Staff about denial of bilingual pay as well as numerous additional alleged incidents of discrimination and mismanagement dating back over a decade and relating to conduct not even covered by the City of Fife's personnel policies. . . .
>
> In the middle of the Prothman agency's investigation, after all witnesses had been interviewed, including the complaining parties and the Department's Command Staff, REDACTED and REDACTED approached the City and requested payment of over a half-million Dollars and promotion within the department in exchange for dropping their charges. According to them, they would "drop" all their complaints and "make it all go away" if the City would pay them off with cash and promotion. My clients are unaware of the City's response to those demands.
>
> REDACTED and REDACTED learned of REDACTED and REDACTED demand for payment and promotion when the Fife Police Guild informed them that the Guild had been asked to broker a deal with the City. The Guild Representative informed my clients that REDACATED would "drop everything" if he were promoted to Lieutenant.

CP 456-57.[5]

A few months later, on March 9, 2012, Chief Blackburn recommended skipping over Hicks and instead promoting the second candidate, Scott Green, to the position of Lieutenant. CP 378. On

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[5] The Court of Appeals has recently determined that these redactions were in violation of the PRA. *City of Fife v. Hicks*, No. 45450-5-II, 2015 WL 774964, __ P.3d __ (Wash. Ct. App. Feb. 24, 2015).

March 15, 2012, Fife followed Blackburn's recommendation and selected Green for promotion. *Id.*[6] After Green's selection, Hicks remained in his role as Acting Lieutenant because there was a second Lieutenant position vacancy. CP 533.

On July 6, 2012, Chief Blackburn met with one of the members of the Civil Service Commission. CP 544. During this meeting Blackburn apparently explained that he did not want to hire from the list, with Hicks as the top candidate. *Id.* The following Monday, July 9, 2012, the Commission held a meeting where one of the members made a motion to extend the civil service list, with Hicks as the number one candidate. In responding to this motion, one of the other Commission members brought up the prior conversation with Blackburn. The discussion was as follows:

> MALE VOICE 1: Okay. Expiration of police lieutenant register.
>
> FEMALE VOICE: Yep. This is set to expire this week. The – all of the names on it have been given to the chief.
>
> . . . .
>
> MALE VOICE 1: I just want to make sure he doesn't want it to expire.

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[6] Green is Caucasian and did not oppose discriminatory conduct at Fife. CP 379.

MALE VOICE 3: May I speak on it? I – when I met with them on Friday, they indicated that that might be the case. But I – I can't speak for the chief, but –

MALE VOICE 2: The expiration idea?

MALE VOICE 3: Yeah. But I can't – I don't want to speak for him, but there was some question about the list and what to do with it. So I think there was a little uncertainty there.

MALE VOICE 2: Do you have –

FEMALE VOICE: (Inaudible.)

MALE VOICE 2: – Mark's phone number? (Inaudible) why don't we just call Mark [Assistant Chief of Police] (inaudible).

FEMALE VOICE: Okay. Yeah. Let's –

MALE VOICE 3: We just – we can wait.

MALE VOICE 1: We can wait on that one. All right.

MALE VOICE 2: Go ahead (inaudible) –

MALE VOICE 1: Yeah, go ahead. Yeah.

MALE VOICE 2: – see if we can find out something, let us know what to do.

MALE VOICE 1: I know everything's turning into such a nitpicky thing, but (inaudible).

MALE VOICE 3: It's not unusual.

MALE VOICE 1: Well, the city –

MALE VOICE 3: You want to get it right (inaudible) –

> MALE VOICE 1: The city's getting bigger. There's a few pissing contests going on, and we just got to make sure that we do everything right.

CP 544-45 (emphasis added). Eventually, Blackburn arrived and the motion to extend the list died. CP 533.

After the list expired, it was obvious the City of Fife would not support Hicks for promotion. On September 20, 2012, Hicks wrote Assistant Chief, Mark Mears, requesting permission to test for an open position with the Criminal Justice Training Commission. CP 379. The request was approved. *Id.* After applying for the instructor position and completing a very competitive testing process, Hicks was selected. CP 380. However, the City of Fife wrote Hicks, stating that Fife would not sign the contract for Hicks to go teach unless he agreed to dismiss his currently pending PRA lawsuit and release his legal claims for retaliation. *Id.* As of the date that Hicks was scheduled to start teaching, Fife had still refused to sign the contract. *Id.* Although Hicks was allowed to teach before the contract was signed, it was a stressful situation where Fife was making Hicks choose between teaching and releasing his legal claims. Hicks is still paid at the rate of a police officer, which is lower than the Lieutenant rate. CP 380.

On June 3, 2014, Hicks filed suit asserting a single cause of action – retaliation in violation of the WLAD.[7] In the facts section of his lawsuit, Hicks outlined some of the evidence supporting his case as follows:

> The City had another vacant Lieutenant position that needed to be filled, but the City did not promote anyone from the Register. At the July 9, 2012 Fife Civil Service Commission Meeting, Commissioner Kory Edwards made a motion to extend the Lieutenant Register before its expiration on July 11, 2012. See Exhibit C. Police Chief Blackburn arrived and convinced the Commission to let the Register expire so that Hicks would no longer be at the top of the list. The Commission agreed to let the Register expire. See *id*. Hicks was not promoted to Lieutenant in retaliation.

CP 2-3 (emphasis added).

Fife filed a Motion for Change of Judge on June 30, 2014, CP 354, and an Answer on July 1, 2014. CP 19. In its Answer, Fife asserted as an affirmative defense RCW 4.24.510 *et seq*. CP 23. On July 17, 2014, Hicks filed a Motion to Amend seeking to add a claim for violation of the PRA and to clarify that the citation to the July 9, 2012 Commission meeting was merely evidence supporting the WLAD retaliation claim. CP 25. While Hicks was clear that he intended to

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[7] Hicks filed a "Claim for Damages," which the City of Fife stamped received on April 2, 2014. CP 524. The form outlined the same evidence presented in Hicks' lawsuit. *Id*. There was no response from Fife after receiving the tort claim. CP 518. There was no communication from Fife asserting its actions were protected by the First Amendment or RCW 4.24.525. *Id*.

utilize this same evidence, it was unnecessary under the notice pleading standard to cite the evidence with particularity. RP (8/8/14) at 35. Several weeks later, on July 21, 2014, Fife filed a Special Motion to Strike pursuant to RCW 4.24.525. CP 75. On July 31, 2014, Hicks moved to lift the stay invoked by Fife and require Fife to answer Hicks' discovery. CP 202. On August 1, 2014, Fife was successful in its motion to remove the Honorable Susan Serko from the case before she could rule on Hicks' Motion to Amend. CP 354.

On August 8, 2014, the Court denied Hicks' Motions to Amend and Lift the Stay, as Fife represented it was only seeking "to strike the retaliation claim alleged by plaintiff based on the actions of the Civil Service Commission." CP 294 (emphasis added). During this hearing, the trial court noted its initial observation that the anti-SLAPP act would not apply:

> . . . it appears to me that the gravamen of the case is the retaliation and hostile work environment under the laws against discrimination, and it's a factual piece of the whole continuum of facts that got listed in the complaint that the city is saying, "Oh, that's it. That's the violation."

RP (8/8/14) at 6.

> THE COURT: If we've got a jury trial on a retaliation thing, I don't think you're going to have specific questions about did this happen and was it retaliation, did this happen and was it retaliation. It's one thing. It's a continuum of the facts that go on. Am I wrong? I mean that's sort of where my head is. Okay. What do they have to decide factually?

> They're not going to decide did something happen at the commission hearing or not. Does that make sense?
>
> MR. ALTMAN: I can envision a situation where for whatever reason some other evidence didn't come in or part of the claim was dismissed, so all they added was the expiration of this list as evidence of retaliation arguing that to a jury under the jury instructions.
>
> THE COURT: Well, that might be subject to a motion in limine. That would be something else. I mean the question wouldn't be this one event; the commission had a public hearing and didn't extend the list, would it? I mean would that be a jury question? I don't think so. The question is: Do the acts the city participated in did that amount to retaliation?

Id. at 20-21.

On August 25, 2014, the trial court denied Fife's anti-SLAPP motion. CP 563. In reaching this conclusion, the trial court reasoned:

> THE COURT: I did a lot of reading and I come back to the purpose of the statute. And just for the record, I'm going to read it, hopefully slowly. It talks about, you know, "The legislature finds and declares that it is concerned about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." So lawsuits brought, primarily. And then it talks further on, "Strike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern."
>
> And when I look at that and I look at the lawsuit that we're dealing with here, and the fact that it's under the Washington laws against discrimination, that's the type of lawsuit it is, which I'm supposed to interpret broadly, construe liberally, it appears to me that we get down to whether the principal thrust or the gravamen of the claim is not whatever was said at the Civil Service Commission.

> It is retaliation. I think that's a piece of evidence. Whether that is a missed word or not is another story. But this isn't a situation in which the lawsuit is brought primarily to chill the valid exercise of the constitutional rights. It just doesn't seem like that fits.
>
> So I'm going to deny the motion to strike. I think that the real purpose of this statute is when it's directly on point, not when it's just one fact in a series of facts. So that's going to be my ruling.

RP (8/25/14) at 15-16. Fife then appealed. CP 565.

IV. MOTION TO STRIKE

At both the trial court level, CP 87, and in its opening brief, Fife cites an unpublished decision of the Washington Court of Appeals. Fife Br. at 20. GR 14.1 explains "[a] party may not cite as an authority an unpublished opinion of the Court of Appeals." This Court should strike the relevant portion of Fife's brief.

V. ARGUMENT

The WLAD declares that freedom from discrimination is a civil right enjoyed by all Washington citizens. RCW 49.60.030(1). This law similarly recognizes "that practices of discrimination against any of its inhabitants . . . threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state." RCW 49.60.010. The statute mandates liberal construction to accomplish these broad purposes. RCW 49.60.020.

As a consequence, Washington Courts "view with caution any construction that would narrow the coverage of the law." *Marquis v. City of Spokane*, 130 Wn.2d 97, 108, 922 P.2d 43 (1996). Because direct evidence of discrimination "is necessarily rare," Washington Courts allow civil rights plaintiffs latitude to prove their cases through circumstantial evidence and burden-shifting schemes. *Fulton v. State*, 169 Wn. App. 137, 148 n.17, 279 P.3d 500 (2012).

Here, Hicks filed a WLAD retaliation case. And inconsistent with the reason for the anti-SLAPP law, and in complete conflict with the purposes of the WLAD, a governmental employer, Fife, who lacks any free speech rights asks this Court to limit the evidence available to prosecute the civil rights case, grant a $10,000 mandatory penalty, and impose substantial attorney fees against Hicks – all because Fife takes issue with a subset of the evidence supporting the plaintiff's case. The trial court was correct to deny this request.

A. The Anti-SLAPP Statute Does Not Apply To This WLAD Case.

"A SLAPP suit is designed to discourage a speaker from voicing his or her opinion." *Henne*, 341 P.3d at 286. In 2010, the legislature enacted the anti-SLAPP statute, RCW 4.24.525, because it was concerned about "groundless" lawsuits "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and

petition for the redress of grievances[.]" LAWS of 2010, ch. 118, § 1. Dissuading employees from filing lawsuits for civil rights violations was not the intent of the legislature. Similarly, protecting government agencies, which lack free speech rights, was not the intent of the legislature.

The anti-SLAPP statute outlines a two-step process for analyzing a motion to strike. First, the Court must evaluate the "principal thrust or gravamen of the claim" to determine whether it targets a matter of public participation. *Davis v. Cox*, 180 Wn. App. 514, 325 P.3d 255 (2014), *review granted* (October 9, 2014). If this test is satisfied, then the Court considers whether the lawsuit is supported by sufficient evidence. *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 89-90, 316 P.3d 1119 (2014), *review granted* 180 Wn.2d 1009 (2014). In *Dillon*, the Court of Appeals explained:

> . . . . in analyzing whether the plaintiff has shown, by clear and convincing evidence, a probability of prevailing on the merits, the trial court may not find facts, but rather must view the facts and all reasonable inferences therefrom in the light most favorable to the plaintiff.

Id. Here, Fife is not a party that can bring an anti-SLAPP motion. Moreover, the thrust of Hicks' lawsuit is retaliation, not an attack on free speech or public participation. Lastly, Hicks has sufficient evidence to support his retaliation cause of action. These issues,

along with the constitutionality of the anti-SLAPP statute, are discussed in detail below.

B. Fife Is Prohibited Under The Washington Supreme Court's Decision In *Henne* From Bringing An Anti-SLAPP Suit.

Washington's anti-SLAPP statute only permits a "moving party" to file a motion to strike. RCW 4.24.525(4). The statute specifically defines "moving party" as "a person on whose behalf the motion described in subsection (4) of this section is filed seeking dismissal of a claim[.]" RCW 4.24.525(1)(c). In turn, the statute defines "person" as "an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity[.]" RCW 4.24.525(1)(e). The statute specifically does not include "government" in the definition of "moving party" or "person." Instead, "government" is separately defined as "a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority," and is allowed to intervene on behalf of a person. RCW 4.24.525(1)(b). The Washington Supreme Court recently adopted this same statutory interpretation without reaching the ultimate question of whether a governmental agency can ever file an anti-SLAPP motion. *Henne*, 341 P.3d at 289.

Similar to Hicks' case, in *Henne v. City of Yakima*, the Court was faced with an employment lawsuit filed by an officer against the City of Yakima only over actions other officers had taken against him. *Id.* at 286. As the Court explained, "[s]everal other officers had filed complaints about Henne's behavior, resulting in internal investigations of Henne. Henne's lawsuit alleged that those other officers' complaints lodged against him formed a pattern of harassment and retaliation that amounted to a hostile workplace." *Id.* In response, Yakima also filed an anti-SLAPP motion under RCW 4.24.525. *Id.*

On appeal, Yakima argued it could bring an anti-SLAPP motion because "its employees are its agents, and its agents' actions of submitting reports may thus be considered Yakima's actions." *Id.* at 289 n.7 ("we reject Yakima's argument. . . ."). In reaching its conclusion, the *Henne* Court adopted the same statutory interpretation outlined above. First, the Court observed that "[n]o Provision in RCW 4.24.525 Permits a Nonspeaker To Assert the Rights of a Speaker." *Id.* at 288. The Court framed the issue before it "as whether Yakima may be a 'moving party' on whose behalf an anti-SLAPP motion may be filed." *Id.* at 289. In answering this question in the negative, the Supreme Court reasoned as follows:

> RCW 4.24.525(4)(e) provides guidance on how to answer that question. It states, "The attorney general's

> office or any government body to which the moving party's [communicative] acts were directed may intervene to defend or otherwise support the moving party." (Emphasis added.) The statute thus expressly distinguishes the "moving party" from the "government body to which the moving party's acts were directed." Under the statute, Yakima would be free to intervene to "defend or otherwise support" the officers who submitted reports to the city, had Henne sued those officers. Certainly the officers themselves, had they been sued, would have standing to challenge the lawsuit under RCW 4.24.525. But the statute does not contemplate that the government body to which speech is directed may itself be a "moving party." Instead, it recognizes that the speaker is the "moving party" and the governmental entity to which the speech is directed is not the "moving party."

Id.

Here, Fife's Assignment of Error makes clear that it filed the motion because the lawsuit was "targeting protected participation and petition activity of the City's Civil Service Commission." Br. at 4 (emphasis added). This was the same representation that Fife made to the trial court when fighting to avoid answering discovery: "In this motion, the City requested the Court strike the retaliation claim alleged by plaintiff based on the actions of the Civil Service Commission." CP 294 (emphasis added). However, Fife has also made clear that "[t]he City and the Commission are two distinct legal entities." *Id.* This inconsistency was not lost on the trial court: "THE COURT: Let me stop you. The defendant here is the city, not the commission." RP (8/8/14)

at 7-8. But, as held in *Henne*, Fife cannot file an anti-SLAPP motion based on the conduct of another party.

To the extent Fife argues, inconsistent with its Assignment of Error and what it represented to the trial court, that it is actually moving based on the public participation of Blackburn, the Court should also reject this argument. The same claim was raised in *Henne*: "we reject Yakima's argument that its employees are its agents, and its agents' actions of submitting reports may thus be considered Yakima's actions." *Henne*, 341 P.3d at 289 n.7 (emphasis added). Therefore, though Fife may be held legally responsible for Blackburn's retaliatory actions under the WLAD, under the anti-SLAPP statute, Fife's WLAD liability is not relevant. The analysis in *Henne* should govern: No provision in RCW 4.24.525 permits a nonspeaker to assert the rights of a speaker. Just because Fife is liable for Blackburn's actions does not make it a moving party under the anti-SLAPP statute.

C. As A Government Agency, Fife Can Never Bring Anti-SLAPP Motion.

Even if Fife were to distinguish the present circumstance from *Henne*, the same statutory interpretation embraced by *Henne*, leads to the conclusion that the government cannot ever bring an anti-SLAPP motion. As stated in *Henne*, the government has a specific role in the

anti-SLAPP procedure. It is allowed to intervene and support the moving party. While the three concurring Justices in *Henne* would have allowed Yakima to bring an anti-SLAPP motion, the majority of the *Henne* Court, six Justices, recognized the statutory interpretation advocated for by Hicks. *Id.* at 289-90.

This is consistent with case law interpreting Washington's initial anti-SLAPP statute, RCW 4.24.510, designed to immunize individuals from liability for reporting complaints to government. In *Segaline v. State, Dept. of Labor and Industries*, 169 Wn.2d 467, 473, 238 P.3d 1107 (2010), the Washington Supreme Court concluded that government is not a "person" within the meaning of RCW 4.24.510 because government has no free speech rights and the entire purpose of the anti-SLAPP statute was to protect free speech rights. *Id.* The First Amendment was enacted to protect free speech from government. Applying the statute to allow government to bring a motion to strike on a claimed interference with its own speech turns the First Amendment on its head.

Though RCW 4.24.525 broadened the anti-SLAPP law to apply to more communications in more instances, the enactment of that statute in 2010 did not in any way alter the underlying analysis in

Segaline. The *Henne* Court recognized this. Responding to Yakima's argument that it is a "person" under RCW 4.24.525, the Court stated:

> Yakima's statutory interpretation argument does not consider the portion of [RCW 4.24.525] that explicitly distinguishes between the governmental entity and a "moving party" who can bring an anti-SLAPP suit. Nor does it consider the portions of [RCW 4.24.525] stating that it protects the "rights of free speech" and "the constitutional right of petition . . . rights that the constitution grants to individuals against the government not the government against individuals.

Henne, 341 P.3d at 288 (internal citation omitted).[8]

Thus, regardless of whether Fife is moving based on the conduct of the Civil Service Commission, Blackburn, or some combination, Fife is still not permitted to file an anti-SLAPP motion. As a government agency, Fife has no speech rights and is not a moving party under RCW 4.24.525. It therefore cannot file an anti-SLAPP motion under any circumstances. Its role is limited to supporting a motion when filed by a non-governmental party.

D. Fife's Request To Divide Hicks' Retaliation Cause Of Action Into Separate "Claims" Must Fail.

The Washington legislature expressed the purpose of WLAD as follows:

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[8] That the legislature in enacting RCW 4.24.525 did not ignore the principles underlying the *Segaline* decision is not surprising given that "[i]n enacting legislation upon a particular subject, the lawmaking body is presumed to be familiar not only with its own prior legislation relating to that subject, but also with the court decisions construing such former legislation." *Graffell v. Honeysuckle*, 30 Wn.2d 390, 399, 191 P.2d 858 (1948).

> It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race . . . or the presence of any sensory, mental, or physical disability . . . are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

RCW 49.60.010. Understanding the significance of the civil right at issue, the legislature dictated that the courts liberally construe the WLAD towards the end of eradicating discrimination. RCW 49.60.020. Stated another way, the "statutory mandate of liberal construction requires that we view with caution any construction that would narrow the coverage of the law." *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 848, 292 P.3d 779 (2013). "The purpose of the statute is to deter and eradicate discrimination in Washington – a public policy of the highest priority." *Id.*

Here, Hicks presented a single cause of action – retaliation under the WLAD. In determining whether an employee has experienced retaliation, the jury must consider all of the evidence to determine whether the employer's response is likely to deter a reasonable person from engaging in opposition activity in the future. The United States Supreme Court issued the seminal decision regarding what constitutes

retaliation under Title VII in the case of *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006). This Court relied on *Burlington Northern* in *Tyner v. State*, 137 Wn. App. 545, 565, 154 P.3d 920 (2007). In *Burlington Northern*, the Court explained why context matters and the jury should consider the actions of the employer in the totality:

> We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." [ ]. A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children. [ ]. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. [ ]. Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an "act that would be immaterial in some situations is material in others."

Burlington Northern, 548 U.S. at 69 (internal citations omitted). In this case, the trial court agreed with this reasoning:

> THE COURT: If we've got a jury trial on a retaliation thing, I don't think you're going to have specific questions about did this happen and was it retaliation, did this happen and was it retaliation. It's one thing. It's a continuum of the facts that go on. Am I wrong? I mean that's sort of where

> my head is. Okay. What do they have to decide factually? They're not going to decide did something happen at the commission hear or not. Does that make sense?
>
> MR. ALTMAN: I can envision a situation where for whatever reason some other evidence didn't come in or part of the claim was dismissed, so all they added was the expiration of this list as evidence of retaliation arguing that to a jury under the jury instructions.
>
> THE COURT: Well, that might be subject to a motion in limine. That would be something else. I mean the question wouldn't be this one event; the commission had a public hearing and didn't extend the list, would it? I mean would that be a jury question? I don't think so. The question is: Do the acts the city participated in did that amount to retaliation?

RP (8/8/14) at 20-21.

Fife asked the trial court to focus on only portions of a paragraph from the lawsuit, sever that evidence, and analyze it as a separate claim individual and apart from Hicks' other evidence of retaliation. This is not Washington law.

In determining both the gravamen of the complaint and analyzing whether there is sufficient evidence to allow the case to go forward, the court should look at the cause of action in total. The statute defines "claim" as including "cause of action." RCW 4.24.525(1)(a). This portion of the statute states "'Claim' includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or

filing requesting relief[.]" *Id.* It does not define "claim" as evidence or theory as Fife requests.

While not binding on Washington, the California courts have considered this question and held that courts do not simply look at portions of the evidence supporting a specific cause of action. *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 820, 250 P.3d 1115, 1120 (2011). In *Oasis*, the California Supreme Court explained that "[i]f the plaintiff 'can show a probability of prevailing on any part of its claim, the cause of action is not meritless' and will not be stricken; 'once a plaintiff shows a probability of prevailing on any part of its claim, the plaintiff has established that its cause of action has some merit and the entire cause of action stands.'" *Id.* (quoting *Mann v. Quality Old Time Serv., Inc.*, 120 Cal. App. 4th 90, 106, 15 Cal. Rptr. 3d 215, 223 (2004)). There, the Court was presented with a lawsuit brought by a real estate development company for breach of fiduciary duty, professional negligence, and breach of contract against its former lawyer after he subsequently campaigned against the same development he was hired to work on. *Id.* at 815. In response, the lawyer filed an anti-SLAPP motion. *Id.* Analyzing the developer's lawsuit under the rules stated above, the California Supreme Court concluded that the anti-SLAPP did not require dismissal. Relevant to

this appeal, the *Oasis* Court reasoned: "[t]he complaint identifies a number of acts of alleged misconduct and theories of recovery, but for purposes of reviewing the ruling on an anti-SLAPP motion, it is sufficient to focus on just one." *Id.* at 821.

While Fife cites the intermediate California decision of *Cho v. Chang*, 219 Cal. App. 4th 521, 523, 161 Cal. Rptr. 3d 846, 847-48 (2013), which sought to distinguish *Oasis* based on whether the case presented a mixed cause of action, Fife Br. at 30, the majority of California's Court of Appeals decisions have rejected this argument. *Burrill v. Nair*, 217 Cal. App. 4th 357, 382, 158 Cal. Rptr. 3d 332, 350 (2013), *review denied* (Oct. 2, 2013) ("we are bound to follow the more recent Supreme Court case of *Oasis*. . . . Thus, if Dr. Burrill can show a probability of prevailing on any part of her claim, the cause of action is not meritless and will not be stricken.") (internal quotations and citations omitted); *Wallace v. McCubbin*, 196 Cal. App. 4th 1169, 1212, 128 Cal. Rptr. 3d 205, 239 (2011), *as modified on denial of reh'g* (July 26, 2011) ("We will follow the rule pronounced by our Supreme Court."); *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures*, 184 Cal. App. 4th 1539, 1554, 110 Cal. Rptr. 3d 129, 142 (2010) (holding that where a cause of action refers to both

protected and unprotected activity, if any part of the claim has merit, the cause of action is not subject to the anti-SLAPP procedures.).

In fact, the most recent California decision on this point was issued February 5, 2015 by the California Court of Appeals. *Baral v. Schnitt*, No. B253620, 2015 WL 479792, at *1 (Cal. Ct. App. Feb. 5, 2015). There, the court framed the question as

> whether section 425.16 (anti-SLAPP statute) authorizes excision of allegations subject to the anti-SLAPP statute (protected activity) in a cause of action that also contains meritorious allegations not within the purview of that statute (mixed cause of action). The trial court applied appellate and Supreme Court authority holding that the statute does not. (*See, e.g., Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 124 Cal.Rptr.3d 256, 250 P.3d 1115 (*Oasis*); *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 15 Cal.Rptr.3d 215 (*Mann*).) We agree and affirm.

Id. In disagreeing with the thin distinction Fife seeks to make in this case, that *Oasis* does not apply to a mixed cause of action case, the *Baral* Court reasoned that "[u]nder the rule advocated in *Cho*, defendants would be encouraged to file an anti-SLAPP motion to excise allegations – no matter how minimal in relation to the remainder of the cause of action – merely to stop discovery and force plaintiff to show plaintiff's evidentiary hand early on, with further delay if the motion is denied and there is an appeal." *Baral v. Schnitt*, No. B253620, 2015 WL 479792 (Cal. Ct. App. Feb. 5, 2015) (emphasis added).

Regrettably, the concern raised in *Baral* is precisely what is occurring in this case.

Here, Fife seeks to isolate only select sentences from one paragraph in the factual section of Hicks' lawsuit. CP 2-3. This paragraph begins by stating "[t]he City had another vacant Lieutenant position that needed to be filled, but the City did not promote anyone from the Register." CP 2. The last sentence of the paragraph reads: "Hicks was not promoted to Lieutenant in retaliation." CP 3. The motion filed by Fife focuses solely on the three sentences sandwiched in between those statements, which describe Blackburn's manipulation of the civil service process. CP 2-3. Indeed, Fife's own brief explains that the fundamental purpose of the civil service process is to "require public officials to hire, promote, and discharge employees based on merit rather than political affiliation, religion, favoritism, or race . . . ." Fife Br. at 40 (internal citations and quotes omitted). To the extent Fife refused to hire Hicks because he previously reported discrimination, the fundamental purpose of the civil service system was frustrated by Fife's manipulation of the process. When analyzing both whether the gravamen of the lawsuit is targeting protected activity and whether there is merit to Hicks' cause of action, this Court should

consider all the evidence, not merely half the sentences in paragraph 4.3 of the lawsuit.

E. The Gravamen Is Retaliation, Not An Attack On Speech.

In determining whether the anti-SLAPP statute applies, the court must evaluate the "principal thrust or gravamen of the claim" to determine whether it targets a matter of public participation. *Davis*, 180 Wn. App. at 529. Defendants "'in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant.'" *Dillon*, 179 Wn. App. at 71 (quoting *Martinez v. Metabolife Intern., Inc.*, 113 Cal. App. 4th 181, 188, 6 Cal. Rptr. 3d 494 (2003)). In reaching this rule, the *Dillon* Court reasoned: "[I]t is the principal thrust or gravamen of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute." *Id.* at 72. Here, the trial court concluded that the gravamen of the claim was retaliation:

> And when I look at that and I look at the lawsuit that we're dealing with here, and the fact that it's under the Washington laws against discrimination, that's the type of lawsuit it is, which I'm supposed to interpret broadly,

> construe liberally, it appears to me that we get down to whether the principal thrust or the gravamen of the claim is not whatever was said at the Civil Service Commission. It is retaliation. I think that's a piece of evidence.

RP (8/25/14) at 16. This was correct.

A fair reading of Hicks' lawsuit shows the statements made during the July 9, 2012 meeting are a source of evidence illustrating how Blackburn manipulated the promotion process to insure Hicks would not receive a promotion. The paragraph at issue shows that Hicks is challenging the failure to promote: "Hicks was not promoted to Lieutenant in retaliation." Complaint at ¶ 4.3 (emphasis added). If Hicks intended to challenge the Commission's failure to extend the list, he would have sued the Commission. Hicks did not sue the Commission.

1. There Are No Free Speech Rights Targeted by Hicks.

Washington Courts look to whether the underlying lawsuit seeks to chill constitutionally protected speech. *City of Seattle v. Egan*, 179 Wn. App. 333, 338, 317 P.3d 568 (2014). "Because the legislature's intent in adopting RCW 4.24.525 was to address 'lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances,' this court looks to First Amendment cases to aid in its interpretation." *Id.*

(quoting Laws of 2010, ch. 118, § 1(a)). However, governmental bodies, including both Fife and the Commission, do not enjoy free speech rights. *Segaline v. State, Dept. of Labor & Indus.*, 169 Wn.2d 467, 473, 238 P.3d 1107 (2010) ("A government agency does not have free speech rights."). Similarly, Chief Blackburn does not have free speech rights for his statements made as part of his job duties. "To qualify for First Amendment protection, an employee must show that his questionable speech is actually entitled to constitutional protection." *Harrell v. Washington State ex rel. Dept. of Social Health & Servs*, 170 Wn. App. 386, 406, 285 P.3d 159 (2012). "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Garcetti v. Ceballos*, 547 U.S. 410, 421-23 (2006); *see also, Foley v. Town of Randolph*, 598 F.3d 1, 7-8 (1st Cir. 2010) (no First Amendment protection where the chief of the fire department addressed the media in an official capacity during a press conference). Here, Hicks' lawsuit does not target free speech.

2. **California's Courts Recognize The Difference Between Evidence Supporting A Civil Rights Case And SLAPP Suits.**

The California Courts have also rejected arguments like those made by Fife where the defendant focuses on specific evidence cited

in a lawsuit in an attempt to turn a civil rights case into a SLAPP suit. *Martin v. Inland Empire Utilities Agency*, 198 Cal. App. 4th 611, 615-16, 130 Cal. Rptr. 3d 410, 415 (2011). In *Martin*, the plaintiff "filed a complaint alleging six causes of action deriving from purported racial and age discrimination and retaliation by defendants. . . ." *Id.* The evidence cited in the plaintiff's complaint included "fabricated false allegations and uttered communications for the specific purpose of injuring Plaintiff in his career and occupation and designed to humiliate and embarrass Plaintiff . . . before the Board and before his own staff. Some of the alleged defamatory statements were purported to have occurred during a meeting of the agency's board. . . ." *Id.* (internal quotations and brackets omitted). In response, the defendants filed an anti-SLAPP motion. *Id.* at 616. The trial court denied the defendant's motion and the California Court of Appeals affirmed. The Court of Appeals reasoned:

> Defendants failed to make a prima facie showing that plaintiff's causes of action were based on an act in furtherance of defendants' rights of petition or free speech; hence, contrary to defendant's contention, the burden did not shift to plaintiff to establish a reasonable probability of prevailing. Indeed, we agree with plaintiff's statement that it "is immediately apparent to anyone who reads the Complaint [that this case] is clearly all about race discrimination, harassment and retaliation...." . . . . Indeed, the board meeting is mentioned only minimally in plaintiff's pleadings. Although we make no credibility determination regarding plaintiff's allegations, or weigh

> the merits of his claims, it is clear that his action does not arise from any purported exercise of defendants' privileged governmental acts, which would be covered by the statute.

Id. at 625. *See also McErlain v. Park Plaza Towers Owners Association*, 2014 WL 459777, 2 (N.D.Cal. 2014) ("In applying this principle when considering whether complaints alleging discrimination arise from protected activity, the California Court of Appeal has focused on the nature of the challenged adverse action, rather than on the fact that the defendant may have, at least in part, accomplished the challenged adverse action by engaging in protected activity.").

Here, the trial court correctly determined that the thrust of Hicks' lawsuit was a challenge to the retaliatory employment conduct by Fife. Merely because some of the evidence supporting Hicks' case occurred during a Civil Service Commission meeting does not transform this lawsuit into a SLAPP suit. This Court should affirm.

3. Adopting Fife's Interpretation Of The Anti-SLAPP Act Would Lead To Unintended Results.

Fife argues that when Hicks cited the Fife Civil Service Commission meeting, he turned his WLAD retaliation case into a Strategic Lawsuit Against Public Participation. If Fife was right, which it is not, all of the following would also be SLAPP suits:

- A chief of police testifies during a criminal trial, on the record, that he ordered officers to plant evidence illegally on

a criminal defendant in order to secure a conviction. The criminal defendant later sues for false arrest using this court testimony.

- A chief of police tells the City Council, on the record, that he would never hire an African-American officer. Later, an African-American officer who was also an unsuccessful applicant for a position with the City files suit citing the chief's statements.

- A chief of police writes an opposition statement to the Washington State Human Rights Commission, a governmental body, declaring that he terminated an employee, despite the employee being the best officer the department had ever had, and later the terminated employee cites this statement as evidence supporting a subsequent lawsuit.

Clearly, these examples are why the requirement exists that the gravamen of the complaint be a challenge to free speech or public participation. Either this requirement exists in a meaningful fashion or the anti-SLAPP statute is unconstitutional for all the reasons outlined later in this brief.

F. Hicks' WLAD Retaliation Case Is Meritorious.

The second phase of the anti-SLAPP process requires the Court to determine if there is merit to the plaintiff's cause of action under a standard equivalent to a summary judgment motion.[9] Whether retaliation was a substantial factor in an adverse action, "generally

[9] The text of the statute does not actually support the summary judgment standard. As enacted, the statute requires more than what summary judgment dictates. Because of this, the statute interferes with the constitutional right to jury trial and is unconstitutional. This argument is discussed later below.

presents a question of fact." *White v. State*, 131 Wn.2d 1, 16, 929 P.2d 396 (1997); *see also Coszalter v. City of Salem*, 320 F.3d 968, 978 (9th Cir. 2003) ("Whether an adverse employment action is intended to be retaliatory is a question of fact that must be decided in the light of the timing and the surrounding circumstances."). As discrimination cases are often presented on circumstantial evidence, summary judgment is rarely appropriate. *Johnson v. DSHS*, 80 Wn. App. 212, 226, 907 P.2d 1223 (1996) (noting that "summary judgment should rarely be granted in employment discrimination cases.").

A plaintiff may establish a WLAD violation through either direct or circumstantial evidence. *Alonso v. Qwest Commc'ns Co.*, 178 Wn. App. 734, 744, 315 P.3d 610 (2013). Here, Hicks has both direct and circumstantial evidence that supports his claim.

G. Direct Evidence Supports Hicks' Retaliation Claim.

When an employee presents direct evidence of retaliatory animus, a trial is required for the fact finder to determine the credibility of the evidence. *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 359, 172 P.3d 688 (2007). Direct evidence includes statements by a decision maker and other "smoking gun" motive evidence. *Fulton v. State*, 169 Wn. App. 137, 148 n.17, 279 P.3d 500 (2012). "When the

plaintiff offers direct evidence of discriminatory motive, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial." *Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1066 (9th Cir. 2003) (citations omitted).

Here, Hicks presented direct evidence of retaliation. For instance, Blackburn's letters of August 9, 2011 and October 25, 2011 are both direct evidence of retaliatory motive, which supports the claim without the need for any inferences. These letters reference Blackburn's displeasure in the manner in which Hicks raised complaints about discrimination. The October 25, 2011 letter even goes so far as to tie the displeasure to Hicks' request for promotion. The trial court was correct for denying Fife's anti-SLAPP motion.

H. Circumstantial Evidence Supports Hicks' Retaliation Claim.

An employee demonstrates a *prima facie* retaliation case through circumstantial evidence by showing "that (1) he or she engaged in statutorily protected activity; (2) an adverse employment action was taken; and (3) there was a causal link between the employee's activity and the employer's adverse action." *Estevez v. Faculty Club of Univ. of Wash.*, 129 Wn. App. 774, 797, 120 P.3d 579 (2005). If the employer articulates a legitimate non-retaliatory reason, then the employee can create a question of fact as to whether the claimed reason is

unbelievable or pretext. *Id.* Here, the trial court was correct for denying Fife's motion. Fife has never articulated any reason for why it passed over Hicks, who was ranked first on the Civil Service list, and then declined to hire Hicks for the second Lieutenant position even though Hicks was serving successfully as Acting Lieutenant. The *prima facie* case is outlined below.

1. **Hicks Engaged In Statutorily Protected Activity.**

A plaintiff engages in a statutorily protected activity by opposing conduct he reasonably believes to be in violation of the WLAD. *Estevez*, 129 Wn. App. at 798. Like other WLAD provisions, opposition activity is interpreted broadly. *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 848, 292 P.3d 779 (2013). "The term 'oppose,' undefined in the statute, carries its ordinary meaning: 'to confront with hard or searching questions or objections' and 'to offer resistance to, contend against, or forcefully withstand.'" *Id.* (quoting Webster's Third New International Dictionary 1583 (2002)). Hicks engaged in protected activities on a number of occasions. These include filing with the Human Rights Commission in January of 2011, reporting discrimination internally in March of 2011, and filing a report with the Washington State Patrol in July of 2011.

2. Hicks Was Subjected to Adverse Employment Actions.

Washington courts look to federal interpretations of Title VII as "RCW 49.60 is patterned after Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2 (1982). Consequently, decisions interpreting the federal act are persuasive authority for the construction of RCW 49.60." *Oliver v. Pacific Northwest Bell Telephone Co., Inc.*, 106 Wn.2d 675, 678, 724 P.2d 1003 (1986). Washington will adopt the analysis of federal cases "where they further the purposes and mandates of state law." *Antonius v. King County*, 153 Wn.2d 256, 266, 103 P.3d 729 (2004).

In *Burlington Northern*, the Court held "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* (internal quotations omitted). Addressing the argument raised by Fife, that adverse employment actions can only come in certain discrete forms, the *Burlington Northern* Court held that a general explanation of adverse employment actions is necessary because it will depend on the context when viewing the circumstances in totality. *Burlington Northern*, 548 U.S. at 69.

Most relevant to this appeal, failing to promote is a recognized adverse employment action. *Crownover v. State*, 165 Wn. App. 131, 148, 265 P.3d 971 (2011) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) and holding "Adverse employment action means a tangible change in employment status, such as 'hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'") (emphasis added). The trial court was correct for denying Fife's anti-SLAPP motion.

3. There Is A Causal Link Between Activity And Adverse Action.

To prevail, "a plaintiff bringing suit under RCW 49.60.210 must prove causation by showing that retaliation was a substantial factor motivating the adverse employment decision." *Allison v. Hous. Auth. of City of Seattle*, 118 Wn.2d 79, 96, 821 P.2d 34 (1991). Hick satisfies this element if he participated in an opposition activity, the employer knew of the opposition activity, and the employer still took adverse action against the employee. *Estevez*, 129 Wn. App. at 799 (quoting *Vasquez v. State, Dep't of Soc. & Health Serv.*, 94 Wn. App. 976, 985, 974 P.2d 348 (1999)). "[I]f the employee establishes that he or she participated in an opposition activity, the employer knew of the opposition activity, and he or she was discharged, then a rebuttable

presumption is created in favor of the employee that precludes us from dismissing the employee's case." *Id.*

Here, Hicks participated in opposition activity, Fife knew about Hicks' opposition activity, and he was subsequently denied promotion. In this case, however, Hicks has even more evidence of causation, including but not limited to: (1) the letters written on behalf of Chief Blackburn; and (2) the conversation that took place between Blackburn and at least one member of the Commission. The trial court was correct in denying Fife's anti-SLAPP motion.

I. Fife's Interpretation Of The Act Is Unconstitutional.

This Court should affirm the trial court's decision to deny Fife's motion on each of the grounds set forth above. However, assuming *arguendo*, that Fife was a statutorily correct party to file the anti-SLAPP motion, the gravamen of Hicks' lawsuit brings it within the scope of the anti-SLAPP statute, and Hicks' claims are not sufficiently supported by evidence, then this Court should still affirm because the anti-SLAPP statute is unconstitutional. The unconstitutional nature of the Act includes impermissibly interfering with the constitutional declaration of rights to be free from discrimination, violating the separation of powers doctrine, violating Hick's right to jury trial, violating the right of access to the courts, and violating the First Amendment.

1. The Act Violates Washington's Declaration Of Rights.

A majority of the Washington Supreme Court has determined that the right to file suit for discrimination in employment is a fundamental right under the Washington Constitution. *Ockletree v. Franciscan Health System*, 179 Wn.2d 769, 794, 806, 317 P.3d 1009 (2014). In *Ockletree*, Justice Stevens writing on behalf of four Justices determined that "The Right To Sue for Discriminatory Dismissal Is a Privilege of Washington Citizenship Protected by Article I, Section 12." *Id.* Similarly, Justice Wiggins, casting the decisive fifth vote, determined that as applied to the employee at issue, the WLAD exemption for religious non-profit organizations was unconstitutional. *Id.* at 806. Justice Wiggins wrote: "I agree with the dissent that the exemption of religious and sectarian organizations in RCW 49.60.040(11) is subject to scrutiny under the privileges and immunities clause of article I, section 12 of the Washington Constitution." *Id.* This constitutional right is enshrined in the WLAD. RCW 49.60.010 (WLAD was enacted "in fulfillment of the provisions of the Constitution of this state concerning civil rights"). If the anti-SLAPP Act requires Hicks to prove his case by "clear and convincing evidence" without discovery, then the Act unconstitutionally interferes with the fundamental right to challenge discriminatory employment practices.

2. The Act Violates The Separation Of Powers Doctrine.

Statutes that conflict with the procedural function of the judicial branch are unconstitutional under the separation of powers doctrine. *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 980, 216 P.3d 374, 377 (2009). In *Putman*, the Court explained: "If a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both, but if they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters." *Id.* (citations omitted). While Division One in *Davis*, 180 Wn. App. at 548 and *Spratt v. Toft*, 180 Wn. App. 620, 636, 324 P.3d 707 (2014) declined to hold RCW 4.24.525 unconstitutional, neither Division Two nor the Supreme Court has ruled. If it is necessary to reach the constitutionality of RCW 4.24.525, the Court should hold the statute unconstitutional as it is inconsistent with the allowance for broad discovery under CR 26, it interferes with the provisions for non-suit under CR 41, it interferes with the provisions for the amendment of pleadings under CR 15, and it is inconsistent with CR 56 by requiring a probable success on the merits under a "clear and convincing" standard.

3. The Anti-SLAPP Act Violates Hicks' Right To Jury Trial.

The Washington Constitution provides for the right to trial by jury.

Wash. Const. Art. I, § 21. The language of the anti-SLAPP statute violates this right by having the trial court weigh evidence and imposing a clear and convincing burden of proof. While the Court of Appeals in *Davis*, 180 Wn. App. at 547, recognized this problem and superimposed the summary judgment standard as a method to make the statute constitutional, this is inconsistent with the unambiguous statutory language of the anti-SLAPP statute. Courts are not permitted to redraft statutory language to avoid a conclusion that the statute is unconstitutional. *Washington State Republican Party v. Washington State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 281, 4 P.3d 808 (2000) (holding that "when construing a statute to eliminate its constitutional deficiencies, a court may not strain to interpret the statute as constitutional: a plain reading must make the interpretation reasonable.") (quotations omitted).

4. The Anti-SLAPP Act Violates The Right Of Access.

Article I section 10 of the Washington Constitution explains that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This includes the "right of access to the courts." *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991). This "right of access includes the right of discovery authorized by the civil rules, subject to the limitations contained therein." *Id.*

> That justice which is to be administered openly is not an abstract theory of constitutional law, but rather is the bedrock foundation upon which rest all the people's rights and obligations. In the course of administering justice the courts protect those rights and enforce those obligations. Indeed, the very first enactment of our state constitution is the declaration that governments are established to protect and maintain individual rights.

Id. Indeed, "[i]t is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense." *Id.* at 782. *See also Putman*, 166 Wn.2d at 979 ("Obtaining the evidence necessary to obtain a certificate of merit may not be possible prior to discovery, when health care workers can be interviewed and procedural manuals reviewed. Requiring plaintiffs to submit evidence supporting their claims prior to the discovery process violates the plaintiffs' right of access to courts.").

In *Putman*, the Supreme Court struck down the certificate of merit requirement because of the possibility that a plaintiff might need discovery in order to prove his or her claim. In the realm of civil rights cases, such as that presented by Hicks, gathering the proof necessary to prosecute a case is even more dependent on the discovery process. *Currier v. Northland Servs., Inc.*, 182 Wn. App. 733, 746-47, 332 P.3d 1006 (2014) ("Because employers rarely will reveal they are motivated by retaliation, plaintiffs ordinarily must resort to circumstantial evidence to demonstrate retaliatory purpose.") (internal quotations

omitted). If the requirement of a pre-suit notice is unconstitutional, then a pre-discovery procedure that exposes a civil rights plaintiff to a $10,000 damages award, attorney's fees, and dismissal of what may be a meritorious case in need of discovery, is likewise unconstitutional.

5. The Anti-SLAPP Act Violates The First Amendment.

The First Amendment, through the *Noerr-Pennington* doctrine, provides immunity for those who petition the government for redress. *Manistee Town Ctr. V. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000). "The doctrine immunizes petitions directed at any branch of government, including the executive, legislative, judicial and administrative agencies." *Id.* "Noerr-Pennington is a label for a form of First Amendment protection; to say that one does not have Noerr-Pennington immunity is to conclude that one's petitioning activity is unprotected by the First Amendment." *White v. Lee*, 227 F.3d 1214, 1231 -1232 (9th Cir. 2000). "With respect to petitions brought in the courts, the Supreme Court has held that a lawsuit is unprotected only if it is a 'sham'— i.e., 'objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.'" *Id.* (quoting *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993)). "The fact that a litigant

loses his case does not show that his lawsuit was objectively baseless for purposes of Noerr-Pennington immunity." *Id.* at 1232. Here, Hicks' lawsuit is not a sham. To the extent the anti-SLAPP act imposes liability against Hicks for filing suit, the Act is in violation of the First Amendment.

J. This Court Should Reserve Ruling On Fees For Hicks.

This appeal arises from Hicks' WLAD case. Under the WLAD, should Hicks prevail, he is entitled to attorney's fees. RCW 49.60.030. While the issue is not yet ripe because there is no ruling on the merits of Hicks' underlying claim, if he prevails, this Court should permit Hicks to petition for the reasonable fees and costs associated with this appeal.

VI. CONCLUSION

Respondent requests that this Court affirm the decision below denying Fife's special motion to strike.

Dated this 5th day of March, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Christine L. Scheall, declare under the penalty of perjury of the laws of the State of Washington that on March 6th, 2015, I caused the **Brief of Respondent** to be served via email, pursuant to the parties' mutual consent for service by email:

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